Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MRS. MARIE B. KUHN

Petitioner,

v.

PHILIP MORRIS U.S.A.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Amendment IX of the United States Constitution grants a plaintiff in a judicial proceeding the same right to due process by law extended a defendant under Amendment V?

II. Is an employer automatically exempt from provisions of Title VII of the Civil Rights Act and Equal Employment Opportunity Act, because a member of a protected class was hired to replace a member of a protected class?

III. Whether the Court of 1st review has an obligation to review all information before it, prior to making a determination to insure rights under Title VII of the Civil Rights Act.

IV. Whether terminating an employee, after a complaint of sexual harassment by a protected class employee, threatens public policy and, therefore, does not offer the employer protection from actionable claims in "at will employment states?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

MARIE B. KUHN,
Petitioner

v.

PHILIP MORRIS U.S.A.
Respondent

Petition for Writ of Certiorari To The United States Court of Appeals For the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Marie B. Kuhn, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit regarding The Fifth, Ninth and Fourteenth Amendments, Title VII of the Civil Rights and Equal Employment Opportunity Act, The Americans With Disabilities Act and rights of employees in 'at-will' employment states.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is published and appears at Appendix ("App.") 1. The opinion of the United States District Court For the Eastern District of Pennsylvania is published and appears at Appendix ("App.") 2.

JURISDICTION

The United States Court of Appeals for the Third Circuit filed its Opinion on December 17, 1993 (App. 1). Petition to the United States Supreme Court was filed within ninety (90) days of that Opinion on March 14, 1994. Petition was returned and re-submitted in accordance with rule 33.7.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V "Nor shall (any person) be deprived of ...., liberty without due process of law.

Amendment IX provides that "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people".

Amendment XIV "Nor shall any State deprive any person of ....liberty...without due process of law, nor deny to any person within its jurisdiction the equal protection of laws".

STATEMENT OF THE CASE

On April 12, 1991, Petitioner, Marie B. Kuhn called the Personnel Headquarters of Respondent, Philip Morris U.S.A., issued complaints of sexual harassment in accordance with company policy and

in her verbal and written statements to the company made clear her complaint was not only personal but in behalf of others in the office. Within 8 working hours, and without the benefit of an investigation, Petitioner was placed on a medical leave of absence, requiring a psychiatric evaluation before returning to work.

Dr. Chung, a psychiatrist appointed to evaluate Mrs. Kuhn for the company wrote "At this time there is no evidence that Mrs. Kuhn is suffering from any overt mental illness. From this examination I find her capable of resuming her employment in full capacity with no restriction". Despite this recommendation, Philip Morris reinstated her, ignoring 'with no restriction', and required her to continue psychiatric treatment as a condition of her employment.

Her return to work, under the same Supervisor against whom the sexual harassment complaint was issued, was without stress and

indirect punishment. The others in the office would not come forward fearing the same reprisals and, therefore Ms. Kuhn was left to hang alone. Petitioner continually wrote the Headquarter office, advising them of the treatment she was subjected to during her return and received a response that she should stop writing letters and they viewed this as "disruptive". Two months after her return she was terminated for being "disruptive".

Petitioner on February 14, 1991, just two months prior to her complaint of sexual harassment was rated the highest performance rating the company extends. Two months later she was required to seek psychiatric evaluation and treatment, and only five months later was terminated.

After her termination, Mrs. Kuhn acquired a member of the bar in the state of Pennsylvania to represent her against Philip Morris in Federal Court. It wasn't until after Petitioner was able to obtain a

copy of the Federal Court ruling that she realized a motion for summary judgment was granted, without the benefit of Mrs. Kuhn being represented before the court, because a response and documentation supporting her case was not filed by her attorney.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD BE ISSUED BECAUSE THE NINTH AMENDMENT STATES THAT FAILURE TO LIST A RIGHT IN THE FIRST EIGHT AMENDMENTS DOES NOT MEAN THAT AMERICANS DO NOT POSSESS THE RIGHT. PETITIONER CONTENDS THE RIGHT OF DUE PROCESS WAS DENIED HER AS A PLAINTIFF, THE SAME DUE PROCESS EXTENDED TO CRIMINALS BY OUR FOREFATHERS SPELLED OUT CLEARLY IN AMENDMENT V.

In this instance petitioner did everything possible within her means to obtain proper legal

representation. Most doors were closed because, as Mrs. Kuhn was told, sexual harassment cases are not easily won, others were closed because substantial upfront monies were not available. When an attorney finally decided to accept the case, it was not known until after the Federal District Court ruled that a response to a summary judgment - the plaintiff's side of the story - was not presented to the Court.

Petitioner, therefore was not afforded due process of law, i.e. a trial by jury, nor did she enjoy the right to have the assistance of counsel for her case in this civil claim, to prove the existence of sexual harassment and to clear her name of unsubstantiated claims of disorderly conduct. The state of the land is such that protection of laws under our Constitution is construed to be available only if you commit a criminal act and are a defendant in proceedings. This is an important

consideration to controlling crime, the number one concerns of Americans. By ruling of this Court, Plaintiffs in cases should receive the message it is not necessary to resort to the extreme. Citizens on both sides of the law must know that judges will hold lawyers accountable to serve their needs, thus granting due process and compulsory counsel to venture through this complicated legal system for plaintiffs as well as defendants.

A compelling question of rights of a plaintiff is presented for review before this Court. In this instance, judgment at the District Court level was based "because plaintiff has failed to file a response, we need look only at the complaint and the evidence attached to defendant's motion for summary judgment" (App.2: 6) and "unrebutted evidence" (App. 2: 15). Contradictory evidence was available for review, a member of the bar was retained to present this evidence, but failed to do so. Petitioner, with her attorney, attended a

settlement conference, where she later discovered Magistrate Richard A. Powers specifically discussed that plaintiff had not filed any response to the motion for summary judgment. In spite of the fact petitioner was only a few feet away, she was not personally informed of this and was obligated to wait outside closed doors, because she was not a member of the Bar. Does a court of the land bear any responsibility to insure plaintiff due process by informing said plaintiff by copy of correspondence, access to meetings, etc. when court schedules are not adhered to? Remedy is simply, copy Plaintiff in on all correspondence so discussion can ensue regarding needs of the Court. At the point of obtaining the District Court's order and discovering what occurred, the only recourse to plaintiffs is requesting an Appeals Court to review the case, but a "catch 22" exists because evidence not presented

to the District Court is not accepted for review on appeal, totally ignoring the importance of evidence of fact. This virtually "closed shop" legal system deprived Petitioner due process of law, a right extended under Amendment V of the Constitution.

II. A WRIT OF CERTIORARI SHOULD BE ISSUED BECAUSE THE COURTS BELOW INAPPROPRIATELY APPLIED TITLE VII OF THE CIVIL RIGHTS ACT, THE EQUAL OPPORTUNITY EMPLOYMENT ACT AND DID NOT APPLY THE AMERICAN'S WITH DISABILITY ACT.

The claim before the District Court was discrimination due to Sex and/or Handicap claiming a male Supervisor threw a chair in anger and another male Supervisor smashed plaintiff's in-basket in anger and no disciplinary action was taken towards them (App. 3: 1). Plaintiff believed, because of her sex as well as the fact she suffered from severe depression, mental illness, she was singled out for discipline because she issued a complaint of

sexual harassment against her Supervisor Mr. Paoli Paoli. The Federal Court dismissed these allegations, failing her claim "at the very outset for she was replaced by another woman, a member of the protected class". (App. 2: 10)

Mrs. Kuhn's claim of discrimination was never based on the reason for her termination but rather the reason for her punishment during her employment, specifically the psychiatric evaluation to return to work and required psychiatric treatment after her return.

The Americans With Disabilities Act establishes a clear and comprehensive federal prohibition of discrimination against persons with disabilities in employment . An immediate assumption was made by Philip Morris that Mrs. Kuhn's complaint of sexual harassment was without merit because of her mental illness. No investigation into her allegations transpired prior to

her being sent home on a mandated medical leave of absence.

Further, accepting this application of law, "she was replaced by another woman", opens the door to discrimination throughout the land as long as the individual is replaced by an equal to the terminated employee. This will never eliminate discrimination as we know it, but emphasizes the last equal on the totem pole, who will act subservient and accept discrimination, will be the only one to hold employment in discriminatory situations.

III. A WRIT OF CERTIORARI SHOULD BE ISSUED BECAUSE THE COURTS BELOW NARROWED THE INTERPRETATION OF TITLE VII OF THE CIVIL RIGHTS ACT TO ALLOW THE PRACTICE OF SEXUAL HARASSMENT AND MRS. KUHN WAS NOT ALLOWED TO COMPLETE TESTIMONY.

During her deposition, Mrs. Kuhn requested permission to continue testimony on further instances of sexual harassment. Opposing counsel read into the record that this opportunity would be afforded her later, but in spite of Mrs. Kuhn personally requesting this time during Mr. Paoli's deposition, it never came to fruition. Also, before the district court was testimony of Mrs. Kuhn wherein she testified of several instances of sexually offensive language, including testimony of her complaints of sexual harassment to several members of management and even submitted a written request for a lesser position that was opened, before placing her call to Philip Morris' New York headquarter personnel department. The lower Court did not take into consideration Mrs. Kuhn's attempt to remove herself from this difficult position of sexual harassment before her complaint.

The deposition of Mrs. Kuhn was presented to the District Court in the form of an appendix by

Philip Morris. The contents of this appendix revealed all factors were met, as set forth by the Equal Employment Opportunity Commission, proving Mrs. Kuhn worked in a "sexually hostile work environment. Philip Morris presented a Motion For Permission To File A Supplemental Appendix to the Third Circuit Court Of Appeals and the motion was granted on July 13, 1993. This referenced appendix included documents and deposition testimony of Appellant/Plaintiff and item #3 of Motion states these documents "<u>were part of the district court record</u>". Therefore, the District Court had before it, along with the Motion For Summary Judgment, under oath testimony clearly indicating <u>more than one incident of sexual harassment occurred</u>. All "app. at" notations refer to appendix pages in possession of the lower court of under oath testimony of Mrs. Kuhn:

> App. 119 - Q: "You testified about two different examples. You testified about a statement you made to John McNamara

(Personnel Dept.) back in 1989, you testified about a few discussions with Dave Saffron where you said that he was going to go in and talk to Pete."

App. 120 "Even profanity, sir, because like I said it became a way of life with all of us. It became a way of life. It got so that you'd figure I better take it because if I complain I'm not going to get anywhere".

App. 186 - An incident where female Account Manager Betsy Helsel was hollered at so severely by Mr. Paoli that she began hemorrhaging.

App. 156 - Testimony describing when Mr. Paoli called female manager Cindy Rowlands a Bitch.

App. 156 - Cindy was furious.

App. 156: Dave agreed that something has to be done.

App. 154 A: "That we have to get control of this office again. Everything is out of control. Every day everything is out of control".

App. 157: Mrs. Kuhn's concerns were for everybody in the office.

App. 159: "For everyone, it wasn't a get-up-in-the-morning-and-go-to-work job anymore".

App. 157: "I told him that my concerns are for everybody in the office"

App. 166: Dave Saffron never intended to call and complain and talked Jim Bischoff out of doing same because they feared retaliation.

App. 182: "I felt as hopeless as everybody else did".

This under oath testimony, in possession of the District Court, describing an atmosphere of harassment, should not have to be tolerated in order to earn a living in this civilized society.

The District Court ruled "Based on the record before us" (App.2: 10). The fact is that the court of first review did have before it more than one incident and therefore their ruling of "one example will not support an actionable claim" should be overturned in the interest of justice. However, the court did not have before it testimony or documentation by Philip Morris, evidence of disruptive behavior prior to Mrs. Kuhn's call of sexual harassment complaint, to demonstrate a need for such a severe job action on the part of

the company against Mrs. Kuhn.

Accepting, the District Court's decision as handed down, the consideration before this highest court of the land is, if "one example of sexual harassment will not support an actionable claim for such conduct" (App. 2: 14), how many times does? When does a citizen determine she has been raped often enough, physically and/or mentally, to initiate legal action?

III. A WRIT OF CERTIORARI SHOULD BE ISSUED BECAUSE APPLYING STATE'S RIGHTS IN AT WILL EMPLOYMENT TO SEXUAL HARASSMENT CLAIMS CIRCUMVENTS THE FOURTEENTH AMENDMENT, TITLE VII OF THE CIVIL RIGHTS ACT AND FEDERAL LAW REGARDING THE AMERICAN'S WITH DISABILITIES ACT.

The State of Pennsylvania, under it's rights, has employment at will. Before the lower Courts was a plaintiff who complained of sexual harassment to the Personal Department, following clear company

policy. Employment at will encompasses the right of an employer to terminate "because an employee disagrees with the way in which superiors manage the office", Rossi v. Pennsylvania State University, 489 A. 2d 828 (Pa. Super. 1985) (App. 2: 8). Mrs. Kuhn's complaint of sexual harassment went beyond either a reasonable or unreasonable disagreement of managing an office, she was seeking the right to earn a living in an environment free of harassment. By invoking this at-will application for alleged retaliation of plaintiff's complaint of sexual harassment, Mrs. Kuhn believes public policy is threatened in that victims of sexual harassment will have no recourse or protection under Title VII of the Civil Rights At in "at will" employment states. Is it an instant fact when an employer labels the victim "troublesome" (App. 2:8), when, just two months prior to complaint of sexual harassment, the employee received the highest performance rating the company grants? Is

there no obligation on the part of the employer to justify this label of "troublesome" to the court of initial review? Further, is there no obligation on the part of the employer to at least investigate allegations of sexual harassment to justify the accuser having to undergo immediate psychiatric care.

Cox v. Keystone Carbon Co., 861 F. 2d 390 (3d Cir. 1988) held that the "'conduct must be so outrageous in character and so extreme in degree, so as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" Mrs. Kuhn asks this Court to recognize that the punishment inflicted by mandated psychiatric evaluation, without the benefit of an investigation by the employer, should be intolerable in order to create a civilized society and, therefore the Cox decision should apply to Mrs. Kuhn's claim.

The ruling at the lower level denied Petitioner her rights under Amendment Fourteen, which specifically guarantees that "nor shall any State deprive any person of ..liberty..without due process of law, nor deny any person within its jurisdiction the equal protection of laws". The application of the State of Pennsylvania's at will employment rights to terminate a "troublesome" employee, an employee who in spite of suffering from severe depression, a mental disability, had performance ratings higher than her Supervisor and only missed 7 1/2 days work during her 7 years employment with Philip Morris, denied Mrs. Kuhn's her protection under the American With Disabilities Act.

SUMMARY OF ARGUMENT

Access to protection under Title VII of the Civil Rights Act is as important as the provisions in the law. Recently testimony was given by female

member of the armed forces that, after accusations of sexual harassment, she was placed in a mental ward for three days. In Mrs. Kuhn's case, within 8 working hours of her complaint of, among other concerns, sexual harassment toward her and other females, without the benefit of an investigation, she was placed on a compulsory leave of absence, requiring certification from two psychiatrists before being allowed to return to work. The fact that Mrs. Kuhn was paid her salary during this mandated leave of absence, should not be looked upon favorably, as the humiliation and pain suffered during this month long leave of absence cannot compare with the dollar amount of compensation.

This action was taken on the part of Philip Morris U.S.A. with no prior disciplinary problems existing in Mrs. Kuhn's personnel file. To the contrary, her personnel files held performance reviews over a seven year period showing a consistent highly professional and outstanding

performer.

Because of the reluctance of attorneys willing to accept employment cases, the question of why a male employee who threw a chair in anger and another male employee who smashed Mrs. Kuhn's desk basket were not required to undergo psychiatric evaluations, remains.

It is becoming obvious, unless The Supreme Court of The United States, clarifies protection of sexual harassment, specifically at minimum, an employer is required to investigate claims of sexual harassment, that psychiatric evaluations will be the employer's 'punishment of choice' for women issuing sexual harassment complaints.

FORMAL REQUEST FOR GRANTING OF WRIT

Petitioner, as most citizens, was introduced to what this country stands for, not by studying law, as she does not possess a high school diploma, but as a child reciting the Pledge of Allegiance in school. By repeating this pledge, hand over heart before our flag, she began to understand this as a sacred contract. Mrs. Kuhn has always stood behind her country and that for which it stands, and asks now only that this Court extend the liberty to earn a living and justice for all in our courts.

For this reason, and the foregoing reasons, Petitioner believes the decisions rendered by the lower courts was without justified merit, and calls for an exercise of this Court's power of supervision.

I, Mrs. Marie B. Kuhn, therefore, respectfully requests that this Court grant her petition for the issuance of a writ of certiorari.

Respectfully submitted,

Marie B. Kuhn

Marie B. Kuhn

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1314

MARIE B. KUHN,
Appellant-Plaintiff
v.
PHILIP MORRIS U.S.A. INC.

On appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 92-03081)

Submitted: March 4, 1993

Decided: December 17, 1993

Before SLOVITER, Chief Judge
GREENBERG AND ROTH, Circuit Judges

Affirmed by unpublished opinion

COUNSEL

Marie B. Kuhn, 1011 Fitch Road, Southampton, PA, Pro Se for Appellant. Allan D. Berkowitz, Dechert Price & Rhoads, 400 Bell Atlantic Tower, Philadelphia, PA for Appellee.

OPINION

After consideration of all contentions raised by appellant, it is adjudged and ordered that the judgment of the district court entered March 4, 1993 be and is hereby affirmed. Costs taxed against appellant.

By the Court,

SLOVITER
Chief Judge

Dated: DEC 17 1993

True copy issued in lieu of a formal mandate on January 10, 1994.

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNA.

Marie B. Kuhn	:	
	:	Civil Action No 92-3081
Plaintiff,	:	
	:	
v.	:	
	:	
Philip Morris U.S.A., Inc.	:	
Defendant	:	

MEMORANDUM

Joyner, J. March 2, 1993

This is a proceeding under Title VII of the Federal Civil Rights Act brought by plaintiff, Marie B. Kuhn, against her former employer, the defendant, Philip Morris U.S.A., Inc. Plaintiff's complaint contains allegations of sexual harassment, retaliatory discharge, discrimination on the basis of plaintiff's sex and prior mental illness, intentional

infliction of emotional distress and defamation of character. Jurisdiction is premised upon 28 U.S.C. $1331 (a).

Viewed in the light most favorable to plaintiff, the facts indicate that the plaintiff was originally hired by Philip Morris on March 14, 1984 in the capacity of Merchandising Assistant. In February 1989 Peter Paoli, the Section Director of Philip Morris's office in Malvern, Pennsylvania, interviewed plaintiff for position as his Administrative Assistant and on March 15, 1989 he hired her. During that interview, plaintiff volunteered to Peter Paoli that she had previously been hospitalized for depression.

In the fall of 1990, Peter Paoli made allegations to plaintiff that another employee, Loretta Parrish, was opening mail that she was not authorized to see and writing anonymous

correspondence to the New York office of Philip Morris which was derogatory to Mr. Paoli. Mr. Paoli requested that plaintiff document Loretta Parrish's alleged wrongdoing which plaintiff refused to do. Plaintiff alleges that Mr. Paoli used obscene and vulgar language to harass and embarrass her and other female employees, that another employee of defendant, Allan Miller, made sexually suggestive remarks to her and that Mr. Paoli was violent in front of her.

Based on the above mentioned conduct as well as complaints by other employees, plaintiff complained to Joanne Donovan, personnel manager for Philip Morris, concerning Mr. Paoli. Ms. Donovan came to the Malvern office on April 15, 1991 and placed plaintiff on a paid leave of absence. The terms of the leave were that plaintiff was to receive medical care for her "personal situation" and in order to return to work plaintiff was

required to produce medical certification from her own doctor subject to verification by a Philip Morris physician that she was fit to perform her job without restrictions (Ex. G 1). Despite her objections, plaintiff thereafter saw a psychiatrist, Dr. Chung. Plaintiff filed a complaint with the Pennsylvania Human Relations Commission ("PHRC") on April 24, 1991 generally making the same allegations as contained in this complaint.

Subsequently, on May 12, 1991 plaintiff returned to work after having received a favorable evaluation from Dr. Chung. However, Philip Morris made it a condition of further employment that plaintiff continue to receive psychiatric treatment and that she continue to act in a professional manner (Ex. H.). After returning from her medical leave of

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1. All references to exhibits are to the exhibits attached to defendant's motion for summary judgment.

absence plaintiff sent written complaints to Steve Cozzetto, an employee of Philip Morris, and Eric Taussig, an attorney for Philip Morris. Finally, on July 10, 1991 plaintiff overheard part of a conversation which she believed to be derogatory toward her and created an overall disturbance in the office. Plaintiff was sent home pending an investigation which eventually ended in her discharge from employment with Philip Morris.

Presently before the court is defendant Philip Morris U.S.A., Inc.'s motion for summary judgment. Although Local Rule 20 (c) permits us to treat the motion as uncontested as a result of plaintiff's failure to file a timely response, for the reasons which follow, we will grant the motion on the merits rather than on a technicality.

In considering a motion for summary judgment, the court must consider whether the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits,

show there is no genuine issue as to any material fact, and whether the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P 56 (c). This court is required to determine whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). In making this determination, all reasonable inferences must be drawn in favor of the nonmoving party. Anderson, 477 U.S. at 256, 106 S.Ct. at 2512. While the movant bears the initial burden of demonstrating an absence of genuine issues of material fact, the nonmovant must then establish the existence of each element of its case. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F. 2d 1524, 1531 (3rd Cir. 1990) citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). In this case, because plaintiff has failed to filed a response, we need look only at the complaint and the evidence attached to defendant's motion for

summary judgment.

First, in her complaint, plaintiff alleges that she was discharged as retaliation for her complaints about Peter Paoli and for the filing of her PHRC complaint. (complaint at 33). The law in Pennsylvania is clear that an employer may discharge an employee at any time and without cause in an employment-at-will situation. Paul v. Lankenau Hosp., 543 A. 2d 1148 (Pa.Super.1988) ; Rossi v. Pennsylvania State University, 489 A. 2d 828 (Pa. Super. 1985). There is no evidence that plaintiff was employed under any other conditions than at-will. The exception to this rule is that an employee-at-will may have a cause of action for wrongful discharge when the discharge threatens public policy. Geary v. United States Steel Corp., 319 A. 2d 174 (Pa. 1974); see Smith v. Calgon Carbon Corp., 917 F. 2nd 1338 (3rd Cir. 1990). However, the public policy exception is construed quite narrowly. Field v. Philadelphia Electric Co.,

565 A. 2d 1170 (Pa. Super. 1989). In fact, the Third Circuit found that the Pennsylvania Supreme Court would recognize a cause of action only where there is a "legislative or constitutional endorsement in the form of a specific prohibition, requirement or privilege." Smith v. Calgon Carbon Corp., 917 F. 2d at 1344. Specifically, the Smith court held that the public policy exception is particularly inappropriate where the discharge is the result of workplace conduct. Id. In Rossi, the Pennsylvania Superior Court found that no public policy was implicated when an employee was terminated because he disagreed with the way in which his superiors were managing the department within which he worked. Rossi, 489 A. 2d at 836. In this case, plaintiff has alleged no such "specific prohibition, requirement or privilege" which would justify the application of the public policy exception to the general rule that the decision to terminate a troublesome employee is left to the unencumbered discretion of the

employer. See Id.

Plaintiff alleges that she was discharged as a result of her refusal to perform unlawful acts and for filing a complaint with the Human Relations Commission. (Complaint p.3). However, other than in the complaint in which she states that Peter Paoli required that she misrepresent Loretta Parrish's actions (Complaint 12), when questions on the matter plaintiff stated under oath that Mr. Paoli requested only that she document any past wrongdoing by Loretta Parrish. (Ex. F) ("..he wanted me to do a write-up, outlining all the trouble I have had with Loretta... Pete said he is not asking me to lie, just to write up all the problems of the past."). Furthermore, plaintiff testified under oath that she believed she was retaliated against because she complained to the New York Philip Morris office about Peter Paoli. (Ex. E p. 207 and Ex. J p. 169). If this is true, the retaliatory actions allegedly taken against plaintiff began before she

filed her PHRC complaint when Joanne Donovan placed her on a medical leave of absence. (Ex. G). Based on the record before us, we find that plaintiff's claim that she was retaliated against because she would not fabricate evidence against Loretta Parrish or because she filed a PHRC complaint to be without merit.

Second, plaintiff claims she was the victim of sex and/or handicap discrimination. The standard used for both types of discrimination is the same. Civil Service Com. v. Pennsylvania Human Relations Com., 591 A. 2d 281 (Pa. 1991). That is, plaintiff has the burden of establishing that she is a member of a protected class who was dismissed despite her qualifications and that she was replaced by a person in a nonprotected class. Levendos v. Stern Entertainment, Inc. 860 F. 2d 1227, 1229-30 (3rd Cir. 1988): Civil Service Comm., 591 A. 2d at 282. As to plaintiff's allegations of sexual discrimination, her claim fails

at the very outset for she was replaced by another woman, a member of the protected class. As to the handicap discrimination, plaintiff claims that she was discriminated against because she was mentally ill. However, throughout her deposition and her various letters, plaintiff maintains that she was discharged because of her complaints regarding Peter Paoli not because of her mental problems. Again, plaintiff has not established the requisite prima facie case of discrimination which is her burden to bear. Thus, her discrimination claims are also without merit.

Next, we turn to plaintiff's claim for intentional infliction of emotion distress. Plaintiff alleges that defendant has caused her "severe emotional distress in that plaintiff has been unable to find other similar professional employment because of the emotional scars of Philip Morris' actions and plaintiff has been subjected to rumors and innuendoes of mental illness." (Complaint at 40).

Our analysis of this claim is guided by the case of Cox v. Keystone Carbon Co., 861 F. 2d 390 (3rd Cir. 1988) which held that the "conduct must be so outrageous in character, and so extreme in degree, so as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" Id. at 395 quoting Buezek v. First National Bank of Mifflintown, 531 A. 2d 1122, 1125 (Pa. Super. 1987). A claim for intentional infliction of emotional distress does not lie where the dismissal was undercut by a mere improper motive. Cox. 861 F. 2d at 396. In this case, defendant first placed plaintiff on a paid leave of absence and then once the decision was made to discharge her, she received two months' severance pay. (Ex. B p. 70). In light of the Cox decision in which the Third Circuit refused to recognize such a cause of action where the employer had discharged the employee on the day the employee returned from a three month leave of

absence after undergoing triple bypass surgery, the facts presented by this case do not rise to the level of outrageous conduct necessary to maintain a claim for intentional infliction of emotional distress.

Plaintiff also alleges that she was sexually harassed by Peter Paoli. The Third Circuit has set forth a five prong test which a plaintiff must meet in order to bring a successful claim of sexual harassment based on a hostile work environment: (1) the employee suffered intentional discrimination because of her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of a respondent superior. Andrews v. Philadelphia, 895 F. 2d 1469, 1482 (3rd Cir. 1990). Plaintiff's claim fails in that she has failed to properly allege that the discrimination based on her sex, if any existed, was pervasive and

regular. She testified that there was only one example of any sexually provocative or suggestive conduct by Mr. Paoli. (Ex. D p. 69-70). One example of sexual harassment will not support an actionable claim for such conduct. Ezold v. Wolf, Block, Schorr and Solis-Cohen, 1992 WL 385463, *38 (3d Cir. 1991).

Lastly, plaintiff's complaint contains a claim for defamation of character because "Philip Morris, U.S.A., Inc. has circulated as a reason for her dismissal the fact that she was mentally ill." (Complaint at 37). Plaintiff has never hidden the fact that she has suffered from mental illness. She volunteered the information to Peter Paoli when he first interviewed her for the job of Administrative Assistant. Because truth is an absolute defense to allegations of defamation, Avins v. Moll, 610 F. Supp. 308, 323 (E.D. Pa. 1984), plaintiff's defamation claim must also fail.

After careful examination of the unrebutted evidence before us and the allegations contained in the complaint, this court finds that no reasonable jury could find in favor of the plaintiff on any of the claims contained in her complaint and, thus, summary judgment should be entered in favor of the defendant, Philip Morris U.S.A., Inc.

An appropriate order follows.

ORDER

AND NOW, this 2nd day of March, 1993 upon consideration of Defendant Philip Morris U.S.A., Inc.'s Motion for Summary Judgment, it is hereby ORDERED that the motion is GRANTED.

BY THE COURT:

J. Curtis Joyner, J. (signed)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

MARIE B. KUHN 1011 Fitch Road Southampton, PA 18966	:	NO. 92-CV-3081
vs.	:	Atty I.D. # 31635
PHILIP MORRIS U.S.A. INC. 120 Park Avenue New York, NY 10017	:	

COMPLAINT

DISCRIMINATION DUE TO
SEX AND/OR HANDICAP

42. Plaintiff incorporates by reference all of the above paragraphs as though fully set forth here at length.

43. In May of 1991, James Bischoff, supervisor of the defendant, Philip Morris, at Philip Morris' Montgomery County, Pennsylvania office, threw a chair in anger during a meeting. Mr. Bischoff's actions were witnessed by several

employees of defendant, Philip Morris, Inc. and no action was taken.

44. In March of 1991, Peter Paoli, smashed an "in-basket with his fist while said basket was on the desk of plaintiff. This action was witnessed by several employees of Philip Morris, Inc., however no disciplinary action was taken towards Mr. Paoli.

45. Plaintiff believes and therefore avers that because of her sex as well as prior mental illness, has been singled out for discipline as a result of her alleged actions as outlined above by defendant, Philip Morris, Inc.